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No. 2702

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco,
Appellant,

vs.

OWE SAM GOON,
Appellee.

BRIEF FOR APPELLANT.

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By....., Deputy Clerk.

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FACTS.

There is no contention as to the following facts with respect to the appellee, Owe Sam Goon: that he is of the Chinese race, and a citizen of China; that he came to the United States before the enactment of the first Chinese exclusion law; that he has ever since been a laborer; that he was duly registered as a Chinese laborer under the Act of May 5, 1892, and that he would now be entitled to be and remain in the United States, provided he has not left the United States since his said registration.

The question to be determined upon this appeal is whether the certified record of the Bureau of Immigration, set forth in the transcript, pages 37 to 89 inclusive, shows that the Secretary of Labor acted

within the authority vested in him by law when he ordered this Chinese alien's deportation *upon the finding that the alien had resided for a time in Mexico, and had surreptitiously entered the United States from Mexico subsequent to July 1, 1914.*

From the said record of the Bureau of Immigration it appears that Owe Sam Goon and another Chinaman were taken from the vent of a refrigerator car on February 19, 1915, in the Southern Pacific Railroad yards at Tucson, Arizona. Upon being examined at length by a United States immigrant inspector on February 20, 1915 (Trans. p. 68-87) Owe Sam Goon accounted for himself and for his presence in the refrigerator car in brief as follows: That he had been employed for many years in Sacramento, California, and vicinity as a cook, and had never been out of the United States since his coming here in 1873 or 1874; that about eight months before his said examination he left Sacramento in search of employment, making his way southward through California to Tucson, Arizona; that he walked all the way from Madera, California, which place he left about four months before his said examination, until he climbed into the refrigerator car from which, after a ride of several hours, he was taken as aforesaid at Tucson. The Court is earnestly requested to read the statements made by Owe Sam Goon during the said examination in order that it may fully appreciate how preposterous was the story told by him of aimless wandering, on foot, for months, through half the length of the State of Cali-

fornia and through the forbidding wastes of Arizona —all with the simple object of finding work. The records of the Immigration Service abound with instances where Chinese, after having been smuggled across the border, were secreted in freight cars, and therein taken into the interior of the country. With such experiences before them, the absolutely unbelievable account given by Owe Sam Goon of his presence in the refrigerator car would alone have justified the immigration officials in coming to the conclusion that he had clandestinely crossed the border from Mexico.

However, before an application was made to the Secretary of Labor for a warrant for the arrest of the alien, a statement was taken at El Paso, Texas, on February 26, 1915, from one Pascual Carrion, manager of the water works department of the City of Juarez, Mexico, who also held a commission to oversee Chinese affairs in that city (Trans. p. 65-68). *Carrion was shown a photograph of Owe Sam Goon, which he immediately and positively identified as the photograph of a Chinaman he had seen many times in a laundry in Juarez, Mexico, up to August or September, 1914.* He further told of having shown the said photograph to police officers of Juarez, Mexico, and of their also stating that they had seen the person represented thereby in said Juarez. It should be stated that Carrion was not called upon to identify Owe Sam Goon in person as the Chinaman he had seen in the laundry in Juarez, nor was his statement made in the presence

of Owe Sam Goon. It is not questioned that the photograph shown Carrion is a good likeness of Owe Sam Goon, the appellee.

Based upon the aforesaid statements of Owe Sam Goon taken February 20, 1915, and of Pascual Carrion taken on February 26, 1915, an application was made to the Secretary of Labor on February 27, 1915, both by mail (Trans. p. 63, 64) and by telegraph (Trans. p. 89) for a warrant for the arrest of the alien. The warrant was accordingly issued by the Assistant Secretary of Labor on February 27, 1915 (Trans. p. 40-42), the part thereof material to this matter being as follows:

> "WHEREAS, from evidence submitted to me, it appears that the alien, Owe Sam Goon, who landed at an unknown port, on or about the 15th day of February, 1915, is subject to be taken into custody and returned to the country from whence he came under Section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese exclusion laws, for the following among other reasons:
>
> "That he re-entered the United States in violation of Section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, whereas, from evidence submitted to me, it appears that the said alien has been found in the United States in violation of the act of February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:
>
> "That he entered in violation of Section 36 of said act (rule 13).

> "I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law."

Pursuant to the directions contained in the warrant, the alien was brought before an immigrant inspector on March 1, 1915, for the purpose of granting him a hearing to enable him to show cause why he should not be deported in conformity with law (Trans. p. 50-58). At the hearing the warrant was presented, read and explained to the alien, who was further advised of the nature of the proceeding and the evidence (including the aforesaid statement made by Pascual Carrion on February 27, 1915) against him. He reiterated the material statements made by him in his aforesaid examination of February 20; stated that he was never in Juarez, Mexico, but that he could offer no evidence to support this statement; admitted that he had never secured a laborer's return certificate under the Chinese exclusion laws, and that he at no time within the last three years had made application for admission into the United States to any immigration officer at a port of entry for Chinese or aliens generally; and waived the right of counsel.

The record of the hearing was then forwarded to the Commissioner General of Immigration, Washington, D. C. (Trans. p. 47, 48), who, in a memorandum reviewing the case for the Assistant Secre-

tary (Trans. p. 45, 46) expressed the opinion that the charges contained in the warrant of arrest had been substantiated, and recommended the alien's deportation to China, which recommendation was approved by the Assistant Secretary (Trans. p. 46). Thereupon the warrant of deportation, dated March 9, 1915 (Trans. p. 43-45) was issued, and the alien delivered thereunder to the appellant for deportation, when this habeas corpus proceeding was instituted before the District Court.

The material part of the warrant of deportation is as follows:

> "WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the alien, Owe Sam Goon, who landed at an unknown port, subsequent to the 1st day of July, 1914, is subject to be returned to the country whence he came under Section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese exclusion laws, in that:
>
> "He re-entered the United States in violation of Section 7, Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Alfred E. Burnett, held at Tucson, Ariz., I have become satisfied that the said alien has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, in that:

"He entered in violation of Section 36 of said Act (rule 13)."

Particular attention is called to the fact that the warrant of deportation contains two separate and distinct findings: (1) *that the alien re-entered the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and* (2) *that he entered the United States in violation of Section 36 of the Immigration Act of February 20, 1907, amended by the Act of March 26, 1910.* It will be noted that the warrant of arrest charged the same violation of each law, and that the alien was given a full opportunity to meet each charge.

THE LAW.

Section 21 of the said Immigration Act is in part as follows:

> "That in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by Section 20 of this Act."

The authority of the Secretary of Labor under this section to order the deportation, within three years after entry, of Chinese found to be in the

United States in violation of the Chinese exclusion laws is recognized by the Court below (Trans. p. 9) and has been repeatedly recognized by the other Courts.

Sibray vs. *United States* (C. C. A. 3rd Circ.), 227 F. 1;

Jeung Bow vs. *United States* (C. C. A. 2nd Circ.), 228 F. 868;

United States vs. *Sisson* (D. C.), 222 F. 693;
Ex parte Lee Ying (D. C.), 225 F. 335;
Ex parte Woo Shing (D. C.), 226 F. 141;
Ex parte Chin Him (D. C.), 227 F. 131;
Ex parte Wong Yee Toon (D. C.), 227 F. 247.

Section 7 of the Chinese exclusion act of September 13, 1888, provides that a Chinese laborer claiming the right to be permitted to leave the United States and return thereto must, before his departure from the United States, apply to the proper immigration official for a return certificate, which will be issued to him before departure upon the submission of satisfactory evidence that he has a lawful wife, child, or parent in the United States, or property therein of the value of $1000, or debts of like amount due him and pending settlement. The section goes on to state that this return certificate "shall be the sole evidence given to such person of his right to return," and that "no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer in charge at the port of such entry the return certificate herein required." In

United States vs. *Tuck Lee,* 120 Fed. 989, it was held that where a Chinese laborer departs and returns without such certificate he is subject to deportation; and in *Hom Yuen* vs. *United States,* 214 Fed. 57, that his certificate of residence is thereby abrogated.

Section 36 of the Immigration Act is as follows:

> "That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by Sections 20 and 21 of this Act: *Provided,* that nothing contained in this section shall affect the power conferred by Section 32 of this Act upon the Commissioner General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

In *United States* vs. *Wong You,* 223 U. S. 67, it was settled that a Chinese, like any other alien, who enters the United States surreptitiously, may be deported under a warrant issued by the Secretary of Labor as being in the country in violation of Section 36 of the immigration laws, irrespective of the fact that he might also be subject to expulsion under the Chinese exclusion acts.

Immigration Rule 13, referred to in above warrants, is, so far as it is necessary to quote it for the purposes of this case, as follows:

> "INSPECTION ON MEXICAN BORDER.
>
> "Subdivision 1. PORTS OF ENTRY. Under

Section 36 the following are named as Mexican border ports of entry for aliens: Brownsville, Hidalgo, Laredo, Eagle Pass, Del Rio and El Paso, Tex.; Douglas, Naco and Nogales, Ariz.; and Andrade, Campo, Calexico and Tia Juana, Cal.

"Subd. 2. PROCEDURE. Aliens applying for admission at the Mexican border ports of entry are subject to examination in the same manner and to the same extent as though arriving at seaports, report of inspection to be made on the appropriate form."

ARGUMENT.

The opinion of the Court below was expressed upon the overruling of the demurrer and the ordering of the writ of habeas corpus to issue (Trans. p. 9-11). Although a return to the petition was afterwards filed by the appellant (Trans. p. 13-16) and a traverse to the return by the appellee (Trans. p. 17-22), the Court in discharging the petitioner (Trans. p. 23) expressed no further views upon the case.

From the said opinion (Trans. p. 9-11) it will readily be seen that the Court considered only the legality of the Assistant Secretary's finding in the warrant of deportation that the alien was in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, and either overlooked or ignored the other finding contained in the warrant, to-wit, that the alien was in the United States in violation of Section 36 of the Immigration Act of February 20, 1907, amended by

the Act of March 26, 1910, which latter finding was in itself—if the hearing was not manifestly unfair, or there was not a manifest abuse of discretion on the part of the executive officers (*Low Wah Suey* vs. *Backus,* 225 U. S. 468)—fully sufficient under the law to support the order of deportation. *U. S.* vs. *Wong You,* 223 U. S. 67 *supra.* Consequently, as the said opinion shows, the Court confined its ruling strictly to the question, whether, in passing upon the legality of the alien's residence in this country under a Chinese exclusion act, the Assistant Secretary could base his adverse decision upon evidence that would not have been admissible had the proceeding been before a United States Commissioner or Judge. It will be observed that the Court substantially admits that, had the Assistant Secretary found upon the same evidence that the alien was in the country in violation of a provision of the Immigration Act, the Court would be without power to set aside the finding of the Assistant Secretary. Inasmuch as the Assistant Secretary *did* find that the alien was here in violation of a provision of the immigration law, to-wit, Section 36, it is submitted that the Court below should be reversed.

Assuming, merely for the purpose of discussing the District Court's opinion, that the Court disposed of the whole matter before it by passing upon the validity of the Assistant Secretary's finding that the alien was in the United States in violation of a Chinese exclusion law, the appellant maintains that the Court erred in holding, first, that the testimony

of the witness Pascual Carrion, in which he identified a photograph of the alien as representing a Chinaman he had seen in Mexico, was the only evidence upon which the Assistant Secretary's order of deportation was based, and, second, that the said testimony of Carrion was evidence of such a character that the Assistant Secretary could not lawfully consider it in determining that the alien had been in Mexico.

With respect to the first holding, the Court evidently overlooked the fact that the circumstances under which the alien was apprehended, and his utter inability to explain those circumstances with any degree of plausibility, when coupled with the knowledge that the Department of Labor had that many Chinese who have been smuggled over the border from Mexico have been concealed in freight cars for the purpose of getting them to interior points, might well have satisfied the Assistant Secretary that the alien had come from Mexico. The Court states that Owe Sam Goon was not found near the Mexican border. He was found at Tucson, Arizona, which, while not on the border, is still in what may be termed the border zone, and is a place through which trains bound for the interior pass in going from points nearer the border than Tucson. The alien himself admits that he had ridden for several hours in the refrigerator car from which he was taken. His inability to tell where he entered the car, or where he was when taken therefrom, strongly indicates that he had not reached his des-

tination, but intended to stay in the car until he did. If he were not a smuggled Chinaman, why was he unable to tell a story with at least a suggestion of the stamp of truth upon it?

The ruling that the testimony of Pascual Carrion was improperly considered as evidence in determining the alien's status, presents a question that is very important to the officials of the Department of Labor whose duty it is to enforce the Chinese exclusion laws.

In providing that when "the Secretary of Labor shall be *satisfied* that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act, or of any law of the United States (in the present case the Chinese exclusion law of September 13, 1888), he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came * * *," Congress in no way intimated that in a case coming under the provisions of a Chinese exclusion law the Secretary must be satisfied by evidence admissible in a Court of law, although in a case coming under the Immigration Act the Secretary may be satisfied from evidence not admissible in a court of law. There is no intimation that the summary proceeding, recognized in all authoritative decisions of the Courts, to have been contemplated in cases coming under provisions of the immigration law, should be in any

respect restricted in cases coming under the provisions of the Chinese exclusion laws. The only conceivable purpose of Congress in thus giving the Secretary of Labor concurrent jurisdiction with United States Commissioners and Judges in the expulsion of Chinese who are here unlawfully must have been to provide a more summary and effective means of expelling them. The calendars of the Courts were not crowded with such cases, and surely Congress could not have considered that the Secretary of Labor, who is not required to have the qualifications of a jurist, or even a lawyer, could pass upon Chinese cases more in conformity with the rules of evidence than United States Commissioners or Judges. Furthermore, Congress must have considered that the inspectors who were to conduct the departmental hearings were not required under the rules governing their appointment to possess any knowledge whatsoever of the rules of evidence.

Although in *United States* vs. *Wong You,* 223 U. S. 67 *supra,* the question decided was whether a Chinese could be expelled under a warrant issued by the Secretary of Labor on the ground that he entered the United States in violation of Section 36 of the Immigration Act, and the question here being discussed is whether a Chinese can be expelled under a warrant of deportation issued by the Secretary of Labor on the ground that he is in the country in violation of a provision of the Chinese exclusion law, the question whether Congress intended by the Immigration Act to subject Chinese, like other

aliens, to summary departmental proceedings, the holding of the Court in favor of the jurisdiction of the Secretary of Labor in cases relating to Chinese, is as applicable to the case at bar as it is to that case.

> "By the language of the act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier more cumbrous proceeding which this partially overlaps. The existence of the earlier laws only indicates the special solicitude of the Government to limit the entrance of the Chinese. It is the very reverse of a reason for denying to the Government a better remedy against them alone of all the world, now that one has been created in general terms."

In *Lee Lung* vs. *Patterson,* 186 U. S. 168, the Supreme Court said:

> "* * * we cannot assent to the proposition that an officer or tribunal, invested with jurisdiction of a matter, loses that jurisdiction by not giving sufficient weight to the evidence, or by rejecting proper evidence, or by *admitting that which is improper."* (Italics volunteered.)

This general principle is fully applicable to the present case inasmuch as it may be considered settled from the following cases cited *supra* that Section 21 of the Immigration Act gives the Secretary of Labor power to expel Chinese in the United States in violation of the Chinese exclusion laws.

Sibray vs. *United States* (C. C. A. 3rd Circ.), 227 F. 1;

Jeung Bow vs. *United States* (C. C. A. 2nd Circ.), 228 F. 868;

United States vs. *Sisson* (D. C.), 222 F. 693;

Ex parte Lee Ying (D. C.), 225 F. 335;

Ex parte Woo Shing (D. C.), 226 F. 141;

Ex parte Chin Him (D. C.), 227 F. 131;

Ex parte Wong Yee Toon (D. C.), 227 F. 247.

From the reported decisions it does not appear that this question of evidence has ever been directly raised in any other case. There are cases, however, in which the Courts have without question recognized the principle herein contended for in behalf of the appellant.

Sibray vs. *United States* (C. C. A. 3rd Circ.), 227 F. 1;

Jeung Bow vs. *United States* (C. C. A. 2nd Circ.), 228 F. 868;

Ex parte Chin Him (D. C.), 227 F. 131;

Ex parte Wong Yee Toon (D. C.), 227 F. 247.

In *Sibray* vs. *United States supra,* the Secretary of Labor, under the authority of Section 21 of the Immigration Acts, had ordered a Chinese deported on the sole ground that he had entered the United States in violation of Section 6 of the Chinese exclusion act of May 5, 1892. The Court said:

> "It is true the proceeding was not conducted in all respects as if a trial in Court had been in progress, but this was not necessary; the Act of 1907 contemplates a summary investigation and not a judicial trial, and while an alien's

> right to be heard must be respected and the discretion of the officials must not be abused, the formalities of procedure and rules governing the admissibility of evidence have been much relaxed. *U. S.* vs. *Uhl* (C. C. A. 2nd Circ.), 215 F. 573; *Choy Gun* vs. *Backus* (C. C. A. 9th Circ.), 223 F. 492."

Farther on, in the same decision, the Court said:

> "The Act does not provide for process to compel the appearance of witnesses (*Low Wah Suey* vs. *Backus,* 225 U. S. 460), and both parties were therefore obliged to rely on their attendance without compulsion."

Had a judicial proceeding been invoked the appearance of witnesses could have been compelled by process, and the Court did not question that Congress intended by Section 21 of the Immigration Act to deprive Chinese of this valuable right which they had always had when the judicial branch of the Government had sole jurisdiction.

In *Jeung Bow* vs. *United States supra,* as in the case at bar, the Secretary of Labor ordered a Chinese deported under the authority of Section 21 of the Immigration Act, both upon the ground that he was in the United States in violation of a Chinese exclusion law (he having surreptitiously crossed the border from Canada), and in violation of the immigration law (he being liable to become a public charge). The Court, with reference to the objection made that the alien was not represented at the hearing by counsel, said, without differentiating between the two laws invoked:

> "The proceeding under review is not a criminal prosecution, but an administrative hearing before the immigration authorities, and it need not be conducted in accordance with the procedure and rules of evidence which are observed in the courts of law."

In *Wong Yee Toon supra,* which was also a case in which the Secretary of Labor issued a warrant for the deportation of a Chinese on the ground that he was in the United States in violation of a Chinese exclusion law, the Court said:

> "One of the essentials of such a hearing is that there shall be some evidence to sustain the charge which is being heard, although in hearings before administrative officials, they may doubtless accept testimony that would not be admissible in a court of law * * *."

Respectfully submitted,

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